82-877

Office - Supreme Court, U.S.
FILED
NOV 26 1982
ALEXANDER L. STEVAS,
CLERK

NO.

in the Supreme Court of the United States

OCTOBER TERM, 1982

JOSEPH C. BONANNO, SR.,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Albert J. Krieger
ALBERT J. KRIEGER, P.A.
Attorneys for Petitioner Bonanno
1428 Brickell Avenue, Suite 500
Miami, Florida 33131
(305) 377-0800

QUESTIONS PRESENTED

1. Whether it is fundamentally unfair and contrary to petitioner's Fifth Amendment rights to uphold his conviction for the first time on appeal upon charges not made by indictment?

2. Whether it is fundamentally unfair for an appellate court to refuse to appraise petitioner's case as it was charged, tried, and as the trial issues were determined?

If such appellate procedure may be countenanced:

3. Whether coconspirator's statements may be introduced under Rule 801(d)(2)(E), Federal Rules of Evidence, without first determining that a conspiracy exists by independent evidence?

4. Whether the "untainted" evidence is sufficient to sustain petitioner's conviction?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES v

OPINIONS BELOW 2

JURISDICTION 3

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 3

STATEMENT OF THE CASE 4

Nature of the Case and its Disposition 4

Statement of Facts 10

REASON FOR GRANTING THE WRIT 18

THIS COURT OUGHT TO GRANT CERTIORARI IN ORDER TO RECTIFY THE CONSTITUTIONAL ERROR OF THE NINTH CIRCUIT IN ORDERING AND SANCTIONING A FINDING OF GUILT ON REMAND UPON CHARGES NOT MADE BY INDICTMENT AS THIS PROCEDURE DIRECTLY CONFLICTS WITH THE CONSTITUTION, THIS COURT'S OPINIONS, AND DEPARTS FROM THE ACCEPTED COURSE OF PROCEEDINGS SO AS TO CALL FOR THE EXERCISE OF THIS COURT'S POWER OF SUPERVISION. 18

TABLE OF CONTENTS (Continued)

Page

THIS COURT OUGHT TO GRANT CERTIORARI, EVEN IF IT DETERMINES THAT THE APPELLATE PROCEDURES WERE NOT INFIRM, IN ORDER TO ANNOUNCE THAT *GLASSER V. UNITED STATES*, 315 U.S. 60 (1942) STILL REQUIRES THAT "PROOF ALIUNDE" OF THE EXISTENCE OF A CONSPIRACY BE FOUND BEFORE CONCONSPIRATORS STATEMENTS ARE ADMISSIBLE UNDER RULE 801 (d)(2)(E), *FEDERAL RULES OF EVIDENCE*. 25

CONCLUSION 30

CERTIFICATE OF SERVICE 30a

APPENDIX:

Appendix A:

Memorandum of Decision of United States District Court for the Northern District of California dated August 12, 1980 ..... App. A-1

Appendix B:

Order of the United States Court of Appeals for the Ninth Circuit, dated December 9, 1981 ..... App. B-1

TABLE OF CONTENTS (Continued)

Page

Appendix C:

Decision of the United States District Court for the Northern District of California, dated January 1, 1982 .... App. C-1

Appendix D:

Memorandum of the United States Court of Appeals for the Ninth Circuit, dated July 30, 1982 ..... App. D-1

Appendix E:

Order denying Petition for Rehearing of the United States Court of Appeals for the Ninth Circuit, dated October 15, 1982 ..... App. E-1

Appendix F:

Constitutional and Statutory Provisions Involved ..... App. F-1

Appendix G:

Indictment ..... App. G-1

TABLE OF AUTHORITIES

Case	Page
Berger v. United States, 295 U.S. 78 (1935)	23
Chapman v. California, 386 U.S. 18 (1967)	25
Cole v. Arkansas, 333 U.S. 197 (1948)	18, 19, 21, 23
DeJonge v. Oregon, 299 U.S. 353 (1937)	18, 23
Dunn v. United States, 442 U.S. 100 (1979)	18, 21, 22, 23
Eaton v. Tulsa, 415 U.S. 697 (1974)	23
Fiswick v. United States, 329 U.S. 211 (1946)	24
Garner v. Louisiana, 368 U.S. 157 (1961)	21, 23
Gerstein v. Pugh, 420 U.S. 103 (1975)	19, 21
Giordenello v. United States, 357 U.S. 480 (1958)	26
Glasser v. United States, 315 U.S. 60 (1942)	26, 29

TABLE OF AUTHORITIES (Continued)

Page

Gregory v. Chicago,
394 U.S. 111 (1969) 18, 21

Grunewald v. United States,
353 U.S. 391 (1957) 24

In Re Oliver,
333 U.S. 257 (1948) 21

Jeffers v. United States,
392 F.2d 740 (9th Cir. 1968) 23

Mesarosh v. United States,
352 U.S. 1 (1956) 25

Presnell v. Georgia,
439 U.S. 14 (1978) 18

Stirone v. United States,
361 U.S. 212 (1960) 23

Thornhill v. Alabama,
310 U.S. 85 (1940) 18, 21

United States v. Alvarez,
584 F.2d 694 (5th Cir. 1978) 30

United States v. Martorano,
557 F.2d 1 (1st Cir. 1977) 26

United States v. Nixon,
418 U.S. 683 (1974) 26

TABLE OF AUTHORITIES (Continued)

Page

United States v. Perez,
658 F.2d 654 (9th Cir. 1981) 26, 28

United States v. Petrozziello,
548 F.2d 20 (1st Cir. 1977) 26

Additional Authorities

United States Constitution:

First Amendment 3, 20

Fifth Amendment 3, 19

Sixth Amendment 3

Fourteenth Amendment 19

Statutory Provisions:

18 U.S.C. Section 371 ..... 3, 4, 24

18 U.S.C. Section 1503 3

18 U.S.C. Section 1623(c) 22

TABLE OF AUTHORITIES (Continued)

Page

Rules:

Rule 801 (d)(2)(E), Federal Rules of Evidence 8, 9, 25, 26, 27, 28, 29

Miscellaneous:

Parade Magazine, February 12, 1978 11

Hyder Report ("A Report, Charles F. Hyder, Maricopa County Attorney, On the Investigation Into Illegal Wiretapping By Members of the Four County Strike Force; Scope, Motivation, and Ramifications of the Crime," October 4, 1977) 17

NO.

in the Supreme Court of the United States

OCTOBER TERM, 1982

JOSEPH C. BONANNO, SR.,*
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

TO THE HONORABLE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES

*Jack Difilippi was also an appellant in the case below from which this petition has been taken.

Your Petitioner, JOSEPH C. BONANNO, SR., prays that a writ of certiorari issue to the United States Court of Appeals for the Ninth Circuit to review its decision entered on the 30th day of July, 1982, affirming his conviction under 18 U.S.C. Section 371.

OPINIONS BELOW

The Memorandum of Decision dated August 12, 1980, finding Mr. Bonanno guilty of Count One, Conspiracy to Obstruct Justice, is attached hereto as Appendix A. The Order of the United States Court of Appeals for the Ninth Circuit, remanding this cause to the United States District Court for the Northern District of California dated December 9, 1981, is attached hereto as Appendix B. The Decision of the United States District Court for the Northern District of California upon remand, dated January 11, 1982, is attached hereto as Appendix C. The Memorandum of the United States Court of Appeals for the Ninth Circuit, affirming Mr. Bonanno's conviction after limited remand, dated July 30, 1982, is attached hereto as Appendix D. All of these opinions are unreported.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit, affirming Mr. Bonanno's conviction, was entered on July 30, 1982. A timely petition for rehearing was denied on October 15, 1982, (Appendix E), and this petition for certiorari was filed within sixty days of that date. This Court's jurisdiction is invoked under 28 U.S.C. Section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the First, Fifth and Sixth Amendments to the United States Constitution, Title 18, U.S.C., Sections 371 and 1503 and Rule 801(d)(2)(E), Federal Rules of Evidence. *See* Appendix F, for text of provisions.

STATEMENT OF THE CASE

Nature of the Case and its Disposition

This case began its formal existence on April 26, 1979, when a grand jury sitting in San Francisco, California, returned an indictment charging Joseph C. Bonanno, Sr. and Jack Difilippi in Count One with conspiracy to obstruct justice in violation of Title 18 of the United States Code, Section 371. The indictment contained six additional counts against Mr. Difilippi alone. This indictment appears as Appendix G, attached hereto.

Mr. Bonanno was charged with entering into an agreement to influence, intimidate or impede a witness before the grand jury (investigating certain businesses in the Northern California area—businesses to which Mr. Bonanno's sons were allegedly connected) or an agreement to obstruct, influence or impede the due administration of justice.

Prior to trial, numerous motions on behalf of Mr. Bonanno were filed, the most significant of which was the Motion to Suppress and Memorandum in Support of Motion to Suppress. For approximately four years, the government had reconstituted Mr. Bonanno's personal thoughts as expressed in his most private writings. These writings had been torn into pieces and placed in the trash for ultimate destruction. Mr. Bonanno sought to suppress the use of these notes as evidence at trial and their prior use in furnishing probable cause for a search warrant and a Title III wiretap.

Hearings on the motion began on July 13, 1979, and continued for nine days thereafter. During the course of these hearings, supplemental memoranda were filed on behalf of Mr. Bonanno and on behalf of the government.

Following these hearings, Judge Ingram granted in part and denied in part the motion to suppress by Memorandum of Decision, filed November 14, 1979.[1]

The non-jury trial before Judge Ingram commenced on April 11, 1980, and concluded on July 24, 1980. On August 12, 1980, the district court entered its Memorandum of Decision (Appendix A) finding, *inter alia*, Mr. Bonanno guilty of the offense charged in Count One of the indictment. Specifically, the district court found Mr. Bonanno guilty of conspiracy to obstruct justice and further found that "[i]n furtherance of the purposes and objectives of said conspiracy, beyond a reasonable doubt each of the following overt acts [in the Indictment] were committed by one or more of said defendants: A-E, F, M, N (in respect to Count 2 only), Q, R, T, U, V, W (as to Counts 4 and 5 only)."

---

[1]By this order, the following specific items were suppressed: "Any conversations . . . had between defendant and any attorney with whom he had an attorney-client relationship . . . the document denominated 'memoirs,' and all copies or translations thereof, together with any other items [not] relating to the allegations to the indictment on file in this action, and not on their face relevant to the alleged commission of some other crime. All attorney-client communications, particularly those between Albert J. Krieger, Esq. and Mr. Bonanno, together with all attachments and supplements thereto . . ."

Mr. Bonanno was sentenced on January 12, 1981, and a timely appeal to the United States Court of Appeals for the Ninth Circuit was taken.

On appeal, Mr. Bonanno raised only one issue, dispositive in nature. That issue related to the evidence introduced to prove the overt acts alleged in Count One of the Indictment. The verdict, if it is to stand, must rely upon one of those overt acts. That issue was stated as:

> Whether the government violated Joseph C. Bonanno, Sr.'s constitutional guarantees of freedom of thought and right of privacy by both taking and reconstructing his private written thoughts?

On December 9, 1982, the United States Court of Appeals for the Ninth Circuit ordered this case remanded (Appendix B, App. B 1-2), for the limited purpose of determining "the basis for the court's judgment that defendants were guilty of conspiracy to obstruct justice . . . . [and] whether there was sufficient evidence of defendants' guilt apart from any evidence seized as a result of the search of defendant Bonanno's trash."

On December 23, 1981, a hearing was conducted before the Honorable William A. Ingram, United States District Judge for the Northern District of California, pursuant to the Ninth Circuit's direction. On January 11, 1982, Judge Ingram issued his Decision (Appendix C). Without discussion of the basis for his initial finding that Mr. Bonanno was guilty of conspiracy to obstruct

justice,[2] the trial court reviewed the only evidence, which it believed to be untainted by the reconstructing of Mr. Bonanno's private notes and thoughts. The evidence which Judge Ingram considered on remand is set forth and summarized in pages 2-12 of his Decision (App. C-2-C-20). This evidence consisted of certain conversations between Louis Peters and Mr. Bonanno and Louis Peters and Mr. Difilippi, and inferences drawn therefrom. These conversations and their subject matter were not referenced in the indictment (Appendix G),[3] and were solely relevant to the element of intent.[4] The trial court on remand found no fatal variance by its reconstruction of the evidence. Defense counsel vigorously argued that such a finding was tantamount to a second trial and an amendment to the indictment thus violating Mr. Bonanno's Fifth Amendment guarantees. While Judge Ingram expressed his opinion that "this aspect of this case is troubling," (Appendix C, App. C-24), he found that there was no "claim of surprise" nor "lack of knowledge on the part of defendant and his counsel of the evidence supporting the unalleged overt act," *Id.*, and thus concluded that Mr. Bonanno's substantial rights had not been affected. Unaddressed in their entirety

---

[2]Judge Ingram's Memorandum of Decision adjudging Petitioner guilty, dated August 12, 1980, appears as Appendix A hereto, and contains explicit findings of fact for the basis of his initial verdict.

[3]*See* Judge Ingram's Decision of January 11, 1982, p. 15 (Appendix C, App. C-24): "11. None of the overt acts so proven [by the Peter's incident] are alleged in the Indictment, and none of the overt acts which are alleged in the Indictment were proven by the evidence herein discussed."

[4]For this reason, petitioner did not object to its introduction into evidence at trial.

were Mr. Bonanno's arguments that this fact-finding procedure was a trial of an uncharged crime, a judicially-constructed amendment to the indictment, and a violation of Mr. Bonanno's Fifth Amendment rights.

Thereafter, the parties, pursuant to the Ninth Circuit's order (Appendix B), filed supplemental briefs regarding the district court's findings on remand. Again, Mr. Bonanno urged that the trial court's decision upon the limited remand unconstitutionally found Mr. Bonanno guilty of a crime not charged in the indictment returned by the grand jury. Further, Mr. Bonanno claimed that, even if such procedure could be constitutionally countenanced, the trial court's finding of guilt was in contravention of the requirements of Rule 801(d)(2)(E), Federal Rules of Evidence, and the decisions of the Ninth Circuit that independent proof of the existence of a conspiracy and the defendant's connection therewith be found before alleged statements of coconspirators would be admitted against said defendant. Mr. Bonanno also argued that, given the inadmissibility of these statements under Rule 801(d)(2)(E), there was insufficient evidence to support the conspiracy conviction.

On July 30, 1982, the United States Court of Appeals for the Ninth Circuit affirmed the trial court's finding of guilt upon the "untainted" evidence. (Appendix D). The Ninth Circuit's Memorandum Opinion (omitting any mention of the fact that the trial court's finding upon remand of sufficient untainted evidence was unrelated to its initial determination of guilt), affirmed the lower court's legal conclusion that no fatal variance occurred in predicating Mr. Bonanno's conviction upon

a single overt act uncharged in the indictment,[5] and that the district court did not err in its finding under Rule 801(d)(2)(E), Federal Rules of Evidence. As a result, the Ninth Circuit held (Appendix D, App. D-10):

> We are now convinced that the district court concluded that the defendants were beyond a reasonable doubt guilty of conspiracy to obstruct justice based on the evidence concerning the defendant's activities with Peters. Accordingly, we need not consider any issue concerning the admissibility of evidence seized from Mr. Bonanno's trash can unless there is proof that the Peters transaction was a fruit of that search. . . .[6]

---

[5]The Ninth Circuit also failed to address the question of amendment and a violation of Mr. Bonanno's Fifth Amendment rights, and instead framed the issue as a variance between proof and indictment, thus generating inquiry into whether it was harmless error. Mr. Bonanno has always maintained and maintains now, that the harmless error analysis should be inapplicable to the resolution of the issues arising from the appellate and remand procedures in this case.

[6]Ancillary to the court's holding was a finding that the Peters incident was not a fruit of the unconstitutional reconstructing of Mr. Bonanno's personal notes and thoughts.

Statement of the Facts

The indictment under which Joseph C. Bonanno, Sr. was convicted, was filed on April 26, 1979, and charged events occurring in the fall and winter of 1978-1979. To understand the genesis of this indictment requires a backward look to December, 1975.

At that time, the Arizona Drug Control District (also known as the Arizona Strike Force), decided to investigate Mr. Bonanno, a long term resident of the City of Tucson. They had no probable cause to believe that he had committed any crime nor did they have probable cause to link him with any crime of which they were aware. RT 270(3), 370(7).[7] The linchpin of this investigation was a covert taking of Mr. Bonanno's private notes and personal memoranda. These writings, and the fruits thereof, created the basis for the grand jury investigation and constitute the allegations recited as overt acts in the ensuing indictment. By taking these writings, both freedom of thought and rights of privacy were effectively denied to him. We illustrate.

Then in the waning years of his life, Mr. Bonanno lived in a small single family house, similar to others in the neighborhood. He had lived there, or a few blocks away, for over thirty years. During this period, he had been the unwilling and unfortunate subject of intensive Federal Bureau of Investigation (hereinafter FBI) attention. Illegal eavesdropping was routine. In the preceding fifteen years alone, Mr. Bonanno had been

---

[7]Reporters' Transcript references are indicated herein as RT Page (Volume) of the district court pre-trial and trial proceedings.

prosecuted for conspiracy to obstruct justice and acquitted; an indictment for a like alleged offense had been dismissed; he was subpoenaed for grand jury appearances; and he had been the intended victim of a vicious death plot orchestrated by FBI Agent David Hale.[8]

Against this backdrop, Eugene Ehmann, after seven years with the FBI, some of which had been spent in Tucson investigating Mr. Bonanno, joined the Arizona Strike Force. RT 30-31(2). The only articulable activity (if such be the word) of Mr. Bonanno that fostered their efforts was his reputation, which so far as we are aware, is not a violation of any federal statute. (*See* Memorandum of Decision, November 14, 1979, p. 1; testimony of Eugene R. Ehmann, Pretrial Hearings, RT 33(2)).

Ehmann, aided, assisted, and abetted by his former FBI associates, commenced, on December 8, 1975, a surreptitious taking of the contents of Mr. Bonanno's trash can in a novel and bizarre fashion. Early in the morning of the day of the garbage pickup (Mr. Bonanno having placed his garbage cans out for collection the night before), the agents would furtively arrive in a van. The side door would open, the can would be taken into the body of the van, emptied, fake garbage substituted, and the can replaced. RT 39-40(2). The purpose of the substitution was to prevent the discovery

---

[8]*Parade Magazine*, February 12, 1978, Defendant's Exhibit B, RT 1497(31) and 1501(31). Reporters' Transcript references to exhibits are indicated herein at RT Ident (Volume) and Evid (Volume).

of their activities by a chance circumstance. This way, to the unsuspecting observer, the cans would still appear to be full. RT 61(1). This activity continued until on or about April 13, 1979.

The contents of the cans would be taken to a location where they would be sifted for anything of interest. From the beginning, the agents focused upon torn up pieces of paper—usually, the remnants of five by eight inch miniature legal pads which, before being placed in the trash for ultimate destruction, had been torn into scraps approximately one inch square.[9] RT 60(1), 22(2). As if a jigsaw puzzle, these scraps were reconstructed, read, and analyzed by both state and federal authorities. Whatever was gleaned from these papers was interchanged between those two authorities, and sometimes others. RT 35(2).

Typically, when assembled, the memorandum or note, having been written by Mr. Bonanno, were notations to self; calendarings of daily activities; and, meditations, musings, and reflections on past, present, and future events, both real and imagined. These notes, up to and including the month of August of 1978, did not in total, or together with the fruits of investigations therefrom, lead to a finding of probable cause that a crime was being committed, had been committed, or that Mr. Bonanno had participated in any criminal activity. RT 270(3).

---

[9]Over 1500 reconstructed notes alone were provided to Mr. Bonanno in pre-trial discovery. RT 11(1).

In September of 1978, after just short of three years of this gross rummaging through the thoughts of Mr. Bonanno, certain notes were recovered that excited the agents' suspicions. Contemporaneously, the government had mounted a sweeping investigation, general and pervasive in nature, into the activities of Salvatore Bonanno and Joseph Bonanno, Jr., the two sons of Mr. Bonanno. A grand jury, impaneled in the Northern District of California, sat in San Francisco examining the relationship of the two sons with the struggling business entities to which they were arguably connected. Mr. Bonanno was suspected of, in some way, influencing the testimony of witnesses who had been subpoenaed to testify before that grand jury, and interfering with the production of certain records demanded by virtue of subpoenas duces tecum served upon various alleged custodians. RT 2554-55 (39).

By interweaving its interpretations of the notes recovered during September of 1978 with pre-existing suspicion and surveillance, the government sought a Title III eavesdropping order, dated October 6, 1978, providing for interception of the home telephone of Mr. Bonanno. Incoming and outgoing conversations were intercepted, recorded, and monitored.

The application for the Title III order set forth, in detail, the desire of the grand jury for the business records of two of the entities, U.S. Mattress Co. and Kachina Enterprises, Inc., whose relationship and activities with the Bonannos were being investigated. The frustration of the prosecutor and grand jury in their efforts to obtain these records was the thrust of the prayer for the eavesdropping relief. Nevertheless, at the time of the drafting and submission of the Title

III application, these records were already in the possession of a journalist, Marilyn Baker, who enjoyed a symbiotic relationship with the FBI.[10]

In or about November, 1978, Baker told the FBI in San Francisco that she had copies of the Bonanno business records. RT 2497(38), 2538(39). Baker refused to turn over the books and records without guaranteed anonymity. RT 2513-14(38). The FBI would not make such a promise, and the books and records were never sought by subpoena from Baker in spite of the grand jury's stated desire for them. RT 2429-31(38).

Five months later, during the month of March of 1979, Mr. Bonanno, despite unequivocal illness, was ordered to appear before a grand jury and produce those self-same books and records. As anticipated, and as the government had been informed, he did not and could not produce books and records which he did not have. RT 43(3). The government knew very well, or should have known very well, that those books and records were available from Baker.

---

[10]Baker and other media people, as a matter of routine, would regularly meet with members of the FBI. In exchange for leads supplied by the press, the FBI would leak matters which they considered newsworthy to these chosen few of the media. RT 2534-35(39). Through a relationship Baker had cultivated with Salvatore Bonanno's secretary, Baker was able to obtain possession of the books and records for U.S. Mattress Co. and Kachina Enterprises, Inc., RT 2464(38); 2258-59(37). When the secretary was subpoenaed before the grand jury and requested to produce these records, she invoked her privilege against self incrimination. RT 2276-77(37). The books and records were also the subject of a subpoena served upon Mr. Bonanno in Tucson. Although Baker finally returned the records to Salvatore's secretary, in the interim, Baker had photocopied them in their entirety. RT 2493(38).

It was only in July of 1979, after the indictment had been returned, that Baker made arrangements to turn over her photocopies of the books and records to the government. RT 2424(38). An arrangement was made for anonymity, RT 2523(38), which remained secret until exposed by defense counsel some three months later. RT 2310-15(38).

On February 15, 1979, after Baker had returned the books and records, Lou Peters, an FBI informant, telephoned Mr. Bonanno at his home in Tucson.[11] Peters, a car dealer from Stockton, California, had volunteered some two years earlier to become an FBI informant as to the Bonannos after being approached by a prospective purchaser of his dealership. RT 1324-29(29). The prospective purchaser touted himself to be an intimate of the Bonanno sons. Peters recorded many of his numerous meetings and conversations. RT 1345-47(29). He developed a relationship with Salvatore Bonanno and Jack Difilippi, Mr. Bonanno's co-defendant, and was at one time a guest in Mr. Bonanno's home. Regardless of the closeness, he discovered no criminal activity, and, after over two years of meetings, conversations, and observations, the FBI chose to terminate his service. RT 1549(31).[12]

---

[11]It is the evidence recited in this and the following paragraph, to which we refer as the "Peters incident," and upon which the district court seized on remand to find untainted evidence of guilt. This evidence, however, is not the basis for the underlying indictment (Appendix G) nor for the district court's finding of guilt after the bench trial (Appendix A, App. A-11).

[12]In order to do this, the "FBI agents arranged for Peters to be subpoenaed . . . [and] was instructed by the FBI to call Bonanno to tell him of the subpoena." (Appendix D, App. D-4).

In the February 15, 1979, telephone call (a monitored conversation which is not a part of the Title III intercepts), Peters told Mr. Bonanno that he, Peters, had been subpoenaed to appear before the grand jury. He indicated that their interest probably concerned the sale for cash of a car that Salvatore Bonanno had "owned." The mention of cash and his son triggered a panicked reaction in Mr. Bonanno. He eventually suggested to Peters, who manipulated him deftly, that the records of this transaction, of which he was then hearing for the first time, be set aside for further discussion. RT 1690(32).

On March 17, 1979, an extensive search, pursuant to warrant, was conducted in Mr. Bonanno's home. The affidavit in support of the application for the search warrant in major detail tracked the affidavit in support of the application for the Title III eavesdropping warrant of October, 1978.[13] There where, in addition, some facts which had developed subsequent to the eavesdropping.[14]

The intrusion into the reminiscenses and reflections of Mr. Bonanno by reconstituting notes from the trash was not the only indignity which he was compelled to suffer during those years of pervasive surveillance. In early winter of 1977, the FBI, together with the Arizona Strike Force, also obtained authority to install pen registers, with eavesdropping capability, on five separate phones, and a beeper device on Mr. Bonanno's car,

---

[13]Affidavit for Search Warrant, Plaintiff's Exhibit 12, RT 232(2), 232(2).

[14]Whatever facts were developed did not disclose any criminal activity of Mr. Bonanno with respect to the businesses being investigated. RT 209(6).

based upon a perjurious affidavit and false testimony.[15] These illegal acts are detailed officially in the *Hyder Report*, ("A Report, Charles F. Hyder, Maricopa County Attorney, On the Investigation Into Illegal Wiretapping By Members of the Four County Strike Force; Scope, Motivation, and Ramifications of the Crime," October 4, 1977).

As a result of a combination of the notes recovered from the trash, the telephone conversations, the evidence obtained by the execution of the search warrant, and some supplementation by conventional evidence,[16] the government was found to have sustained its burden of proof in a non-jury trial before the Honorable William C. Ingram, United States District Court Judge, Northern District of California. (Appendix A). From that conviction, the appeal to the Ninth Circuit was taken.

The Peters incident (see pp. 15-16, *supra*), although not relating to any overt act recited in the indictment, was relevant to the issue of intent.[17] Indeed, it was

---

[15]"The evidence adduced before this Court, in a hearing which consumed several days, revealed a course of conduct on the part of Arizona State agents, which was both unlawful and reprehensible. This included unlawfully tapping telephone conversations, falsely swearing before state court judges in order to obtain permission to install a beeper device on the defendant's automobile, and execution of false and misleading affidavits." *Memorandum of Decision*, November 14, 1979, p. 2.

[16]This conventional evidence, of course, was the Peters incident.

[17]The record of the trial below contains over 3,000 pages of transcript and 286 government exhibits. The Peters incident, upon which the trial court relied in reaching its conclusion under the limited remand, consisted of five exhibits and a few pages of testimony.

upon this basis that the district court considered it in returning its verdict of guilty on Count One. (Appendix A, App. A-10)

REASONS FOR GRANTING THE WRIT

THIS COURT OUGHT TO GRANT CERTIORARI IN ORDER TO RECTIFY THE CONSTITUTIONAL ERROR OF THE NINTH CIRCUIT IN ORDERING AND SANCTIONING A FINDING OF GUILT ON REMAND UPON CHARGES NOT MADE BY INDICTMENT AS THIS PROCEDURE DIRECTLY CONFLICTS WITH THE CONSTITUTION, THIS COURT'S OPINIONS, AND DEPARTS FROM THE ACCEPTED COURSE OF PROCEEDINGS SO AS TO CALL FOR THE EXERCISE OF THIS COURT'S POWER OF SUPERVISION.

It has been long understood that "conviction upon a charge not made would be a sheer denial of due process." *DeJonge v. Oregon*, 299 U.S. 353, 362 (1937); *accord, Thornhill v. Alabama*, 310 U.S. 85, 96 (1940); *Cole v. Arkansas*, 333 U.S. 197, 200-202 (1948); *Gregory v. Chicago*, 394 U.S. 111, 112 (1969); *Dunn v. United States*, 442 U.S. 100, 106-107 (1979); *cf., Presnell v. Georgia*, 439 U.S. 14, 16 (1978). The appellate procedure employed by the Ninth Circuit in this case sanctioned—indeed invited—the district court to find Mr. Bonanno's guilt for the first time on remand upon an offense uncharged in the indictment; and compounded this error by refusing to review the validity of his initial conviction by consideration of the issues upon which he was tried. *Cole v. Arkansas, supra*, 333 U.S. at 202. Such appellate

procedure so violates the basic principles of due process and so nullifies Mr. Bonanno's Fifth Amendment right not to be held "to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury," that it demands a remedy that only this Court, in its supervisory capacity, can now provide.

Initially, this Court confronted the appellate error about which we complain in this case, in cases involving review of State court affirmances. Thus, based upon Fourteenth Amendment notions of due process solely,[18] this Court recognized the constitutional infirmity of appellate affirmances upon grounds not spawned from the charging document itself.

Cole v. Arkansas, 333 U.S. 197 (1947), illustrates the requirements of due process which should have guided the Ninth Circuit in this case. In reversing, this Court recognized that two basic concepts of due process were violated by such an appellate ruling. First was the notion of fair notice and the right to defend, *id.*, 333 U.S. at 201:

> No principle of procedural due process is more clearly established than that notice of a specific charge, and a chance to be heard in a trial of the issues raised by that charge, if desired, are among the constitutional rights of every accused in a criminal proceeding in all courts, state or federal. * * * It is as much

[18]In State courts the Fifth Amendment requirement of convictions based solely upon indictment does not apply. *See Gerstein v. Pugh*, 420 U.S. 103 (1975).

> a violation of due process to send an accused to prison following conviction of a charge on which he was never tried as it would be to convict him upon a charge that was never made. [omitting citations]

Second, this Court recognized that due process also required appellate review consistent with the trial held below, *id.*, 333 U.S. at 202:

> To conform to due process of law, petitioners were entitled to have the validity of their convictions appraised on consideration of the case as it was tried and as the issues were determined in the trial court.

Both due process concerns have been equally violated by the Ninth Circuit's creative restructuring of Mr. Bonanno's trial in this case. Unwilling to address the First Amendment issue,[19] the Ninth Circuit remanded the case for what amounted to a new, summary trial upon an old record, for a determination whether conviction could be upheld upon evidence unaffected by constitutional infirmity, and an overt act uncharged by the indictment. After the district court announced its second verdict of guilt upon this theoretically disinfected record, the Ninth Circuit affirmed, without reaching the constitutional issue which was not only raised throughout the trial proceedings, but also which directly affected each and every overt act contained in the indictment. In like

[19]This constitutional issue, we acknowledge, is one of first impression in American jurisprudence. Howsoever difficult this issue may be to resolve, we submit that petitioner had a right to a response on its merits.

fashion to the appellate procedure addressed in *Cole*, this circuitous ruling denied Mr. Bonanno his due process rights. *See also, Gregory v. Chicago*, 394 U.S. 111, 112 (1969) (a conviction for disorderly conduct based upon the manner in which a demonstration was conducted upheld by the Illinois Supreme Court upon the grounds that petitioners had refused to obey a lawful order to disperse violates due process); *Garner v. Louisiana*, 368 U.S. 157, 164 (1961) ("[I]t is as much a denial of due process to send an accused to prison following conviction for a charge that was never made as it is to convict him upon a charge for which there is no evidence to support that conviction."); *In Re Oliver*, 333 U.S. 257, 273 (1948).

Related cases of this Court have acknowledged that this principle obtains whether the case is tried before a judge or a jury, *Thornhill v. Alabama*, 310 U.S. 91 (1940) (conviction after bench trial based upon complaint broadly charging loitering and picketing cannot be saved by restrictive view of evidence on appeal to meet constitutional reach of statute); or whether the Fifth Amendment right to be tried solely upon indictment provides an alternative ground for relief, *Dunn v. United States*, 442 U.S. 100, 105-106 (1979).[20]

This Court's holding in *Dunn*, *supra*, should have dispelled any notion that the Ninth Circuit might have had that their approach to the appellate issues and novel remand could pass constitutional muster. In *Dunn*, the petitioner was charged by indictment with perjury, specifically based upon irreconcilable contradictory

[20]In the earlier cases, involving State court convictions, the Fifth Amendment right to trial upon indictment is inapplicable; *see e.g., Gerstein v. Pugh*, 420 U.S. 103 (1975).

declarations (18 U.S.C. Section 1623(c)), between the petitioner's grand jury testimony and statements made on September 30 in an attorney's office. Also introduced at trial was the petitioner's testimony at an October evidentiary hearing, which reaffirmed his September 30 declarations and thus also contradicted the previous grand jury testimony. On appeal to the Tenth Circuit, the petitioner raised the same contention he had raised throughout trial; viz, that the September 30th interview did not constitute an "ancillary proceeding" as required by the statute. In strikingly similar manner to the instant case, the Tenth Circuit upheld the conviction by finding that the material inconsistency of the charges could easily rest upon the October evidentiary hearing rather than the infirm September 30th interview, thus dispelling the need to address the defendant's contention that it was not an "ancillary proceeding" and therefore outside the reach of the statute. Upon this reasoning, the Tenth Circuit identified the sole issue remaining in the case as one of variance between pleading and proof,[21] promptly found that the petitioner had to have anticipated

---

[21]Specifically, this Court held in *Dunn*, that the due process issue preempted the need to discuss whether this creative appellate affirmance constituted an amendment to the indictment or a variance between pleading and proof, *id.*, 442 U.S. at 105-106: "In our view, it is unnecessary to inquire, as did the Court of Appeals, whether petitioner was prejudiced by a variance between what was alleged in the indictment and what was proved at trial. For we discern no such variance. The indictment charged inconsistency between petitioner's statements in the September 30 interview and his grand jury testimony. That was also the theory on which the case was tried and submitted to the jury." We rest upon this artful distinction in urging the appellate error in this case as one of fundamental due process. Nevertheless, if this Court grants certiorari, as an alternative ground, we will also urge that such procedure

the introduction of the October testimony as it was "inextricably related" to his September 30th declaration, and thus ruled that the variance was not fatal.

In reversing the judgment of the Tenth Circuit, this Court again reaffirmed the cited and recited due process principle upon which our petition rests, *Dunn v. United States*, 442 U.S. at 106-07:

> To uphold a conviction on a charge that was neither alleged in an indictment nor presented to a jury at trial offends the most basic notions of due process. Few constitutional principles are more firmly established than a defendant's right to be heard on the specific charges of which he is accused. See Eaton v. Tulsa, 415 U.S. 697, 698-699 (1974) (per curiam); Garner v. Louisiana, 368 U.S. 157, 163-164 (1961); Cole v. Arkansas, 333 U.S. 196, 201 (1948); DeJonge v. Oregon, 299 U.S. 353, 362 (1937). There is, to be sure, no glaring distinction between the government's theory at trial and the Tenth Circuit's analysis on appeal. The

---

(Footnote 21 Continued)

constitutes a latter-day appellate amendment to the indictment, *Stirone v. United States*, 361 U.S. 212 (1960); and a fatal variance between pleading and proof, *Berger v. United States*, 295 U.S. 78 (1935). *See also Jeffers v. United States*, 392 F.2d 740, 753 (9th Cir. 1968) (where mail fraud count was predicated upon a specific theory by indictment, but the government sought to uphold on another theory on appeal, case must be reversed as "[e]ven if the latter was *proved* at trial, we cannot say that such was intended to be *charged* by the grand jury, for the indictment is susceptible of being construed to charge the former by its very wording. . . ." (emphasis in original).

> jury might well have reached the same verdict had the prosecution built its case on petitioner's October 21 testimony adopting his September 30 statement rather than on the September statement itself. *But the offense was not so defined, and appellate courts are not free to revise the basis on which a defendant is convicted simply because the same results would likely obtain on retrial.* (Emphasis added).

Here, the remand to the district court and the retrial of the petitioner, requires the same result. We request that a writ of certiorari issue in order to rectify the unconstitutional result suffered by petitioner here, and to prevent its repetition in future cases.

Further, petitioner's conviction rests upon a conspiracy under 18 U.S.C. Section 371, which requires that *both* an illegal agreement *and* an overt act in furtherance of the conspiracy be pleaded and proved; *Grunewald v. United States*, 353 U.S. 391, 397 (1957); *Fiswick v. United States*, 329 U.S. 211, 216 (1946). This mandate adds but one more basis why petitioner's conviction cannot stand solely upon evidence not contained in overt acts of the indictment.

Finally, were the oft-repeated due process principles contained in the above recited cases as yet unwritten, we would still urge fundamental procedural due process and Sixth Amendment errors in the appellate review of Mr. Bonanno's conviction. Here, the Ninth Circuit directed what it termed a "limited remand" (Appendix

C, App. C-1), to the district court[22] upon the ultimate issue in all criminal cases: the question of whether the evidence sustained guilt beyond a reasonable doubt. Under the superficial gloss of a quest to determine harmless error, the Ninth Circuit sanctioned by this procedure, in this circumstance and under these facts, a retrial stripped of all the due process rights which normally attach to criminal trials. Accordingly, Mr. Bonanno was retried upon remand without the right to prepare his defense, confront the witnesses against him, and have his case tried before an impartial trier of facts. We submit, and will argue if certiorari is granted, that such procedure steps wide of the restrictive reach of the determination of harmless error permitted by *Chapman v. California*, 386 U.S. 18 (1967), and effectively denies Mr. Bonanno his day in court.

THIS COURT OUGHT TO GRANT CERTIORARI, EVEN IF IT DETERMINES THAT THE APPELLATE PROCEDURES WERE NOT INFIRM, IN ORDER TO ANNOUNCE THAT *GLASSER v. UNITED STATES*, 315 U.S. 60 (1942), STILL REQUIRES THAT "PROOF ALIUNDE" OF THE EXISTENCE OF CONSPIRACY BE FOUND BEFORE COCONSPIRATORS STATEMENTS ARE ADMISSIBLE UNDER RULE 801(d)(2)(E), *FEDERAL RULES OF EVIDENCE*.

---

[22] If certiorari were granted, we would also urge that appellate remand to the district court after a bench trial in a criminal case is inherently improper, *cf., Mesarosh v. United States*, 352 U.S. 1, 11-12 (1956) (refusing to remand to trial court for determination of whether sufficient evidence remains in record to sustain guilt

In *Glasser v. United States*, 315 U.S. 60, 74-75 (1942), this Court announced, that the statements of co-conspirators are admissible "only if there is proof aliunde that [the person against whom the declarations are offered] is connected with the conspiracy." Subsequent to this statement, in 1975, Rule 801(d)(2)(E), Federal Rules of Evidence, was promulgated in its present form.

Although this requirement was reaffirmed in 1974, *United States v. Nixon*, 418 U.S. 683, 701 n.14 (1974), this Court has not reviewed any case raising this issue, since the passage of the rule in 1975. At least one Circuit has expressly found during this Court's silence, that the requirement of proof by independent evidence in *Glasser* was legislatively overruled. *United States v. Martorano*, 557 F.2d 1, 11 (1st Cir. 1977); *United States v. Petrozziello*, 548 F.2d 20, 23 n.2 (1st Cir. 1977). Although the Ninth Circuit, in this case and by previous precedent, requires that the preliminary findings required under the rule be found "through the introduction of substantial independent evidence other than the contested hearsay," *United States v. Perez*, 658 F.2d 654, 658 (9th Cir. 1981),

---

(Footnote 22 Continued)

once evidence tainted by perjury removed from consideration); *Giordenello v. United States*, 357 U.S. 480, 488 (1958) (in refusing to uphold defective warrant on new theory not presented at suppression hearing prior to trial, this Court stated: "To permit the government to inject its new theory into the case at this stage would unfairly deprive petitioner of an adequate opportunity to respond. This is so because in the District Court petitioner, being entitled to assume that the warrant constituted the only purported justification for the arrest, had no reason to cross-examine Finley or to adduce evidence to rebut the contentions that the government makes here for the first time.")

see Appendix D, App. D-14, D-15, it has ignored this aspect in its affirmance of the district court's determination upon remand. We illustrate.

Upon remand, the district court reviewed all of the evidence adduced at trial which it determined was untainted by the unconstitutional obtaining and reconstructing of Mr. Bonanno's notes and thoughts. Thus, omitted from its consideration were the results of the government's extensive trash search and the Title III interceptions, which were fruits thereof. The only remaining items of evidence concerned the Louis Peters incident, which evidence consisted of 1) a conversation between Peters and Mr. Bonanno on February 15, 1979, 2) a meeting between Peters and Mr. Difilippi on February 22, 1979, 3) a meeting and conversation between Peters and Mr. Dilfilippi on February 26, 1979, and 4) a meeting and conversation between Peters and Mr. Difilippi on March 21, 1979. Solely upon this evidence, the district court, on remand, concluded that a conspiracy existed, that Mr. Bonanno and Mr. Difilippi were members of that conspiracy, and that both defendants were thus proven guilty beyond a reasonable doubt of the conspiracy charged in Count One of the indictment.

In so finding, the district court had to first find that the test of admissibility for these statements under Rule 801(d)(2)(E), Federal Rules of Evidence has been met, so they could be attributable against each defendant as substantive evidence of guilt. This test, in the Ninth Circuit, is framed as follows:

> Federal Rules of Evidence 801(d)(2)(E) requires proof of three elements: (1) that the declaration

> be in furtherance of the conspiracy; (2) that the declaration be made during the course of the conspiracy; and (3) that there is independent proof of the existence of the conspiracy and of the connection of the declarant and the defendant with it .... *In order to prove the existence of conspiracy under the third prong of the coconspirator exception, the prosecution must establish a prima facie case through the introduction of substantial independent evidence other than the contested hearsay.* (Emphasis added).

United States v. Perez, 658 F.2d 656, 658 (9th Cir. 1981). In explaining its determination of the third factor above, the district court held that "[e]xtrajudicial statements of a defendant are admissible as non-hearsay admissions and may be properly used as evidence of conspiracy," (Appendix C, App. C-23). The Circuit, in affirming this basis for independent proof of the conspiracy, upon remand, elaborated (Appendix D, App. D-15):

> Each defendant's own recorded statements, however, provide substantial independent evidence to establish the existence of the conspiracy so as to permit the introduction of other defendant's statements.

In the "admissions" of Mr. Bonanno, nowhere is there a statement or inference by him that Mr. Difilippi was knowingly acting in concert with him to effect the alleged purpose of the conspiracy. See Appendix C, App. C-2-C-12, wherein these statements are set forth. Instead, the only inference to be drawn, upon the question of admissibility under Rule 801(d)(2)(E) is that each

defendant was seeking a common goal, and this inference can only be drawn by comparing Mr. Bonanno's statements to those of Mr. Difilippi. Thus the inference is necessarily dependent upon the contested hearsay itself.[23] As such, we submit that the district court, and the Ninth Circuit in affirming, have violated the proscription contained in this Court's opinion in *Glasser v. United States*, 315 U.S. 60, 74-75 (1942) that:

> [D]eclarations [of a co-conspirator] are admissible over the objection of an alleged co-conspirator, who was not present when they were made, only if there is proof aliunde that he is connected with its conspiracy. Otherwise hearsay would lift itself by its own boot straps to the level of competent evidence.

If this Court grants certiorari, on this ground, we will urge that this Court expressly announce that the *Glasser* mandate of "proof aliunde" still applies to the finding

---

[23]The only added inference which remains in this evidence as to Mr. Bonanno's guilt, is that which can be drawn from Mr. Difilippi's conversations with Peters, which infer that, in the interim between February 15 (the date of Mr. Bonanno's first monitored conversation with Peters) and February 26, 1979, that Mr. Difilippi had spoken with Mr. Bonanno about the subject matter of his initial conversation with Peters. This, of course, cannot be used as independent evidence of the conspiracy and Mr. Bonanno's involvement therein, as this is not *independent* of the hearsay, i.e., Difilippi's declarations to Peters, sought to be admitted under Rule 801(d)(2)(E). Nevertheless, were certiorari granted on this issue, we would also urge that this evidence, even if admissible, is insufficient to sustain a verdict of guilt on a conspiracy charge, and thus request this Court to do justice by exercising its supervisory powers to overturn Mr. Bonanno's conviction.

necessary under Rule 801(d)(2)(E), and to elaborate upon this requirement by holding that the logic applied here by the Ninth Circuit fails to satisfy this requirement, as one Circuit has expressly so found upon similar circumstances to those in this case. *United States v. Alvarez*, 584 F2d 694, 696-699 (5th Cir. 1978).

CONCLUSION

For all of the above and foregoing reasons, Joseph C. Bonanno, Sr., requests this Court grant certiorari.

Respectfully submitted,

ALBERT J. KRIEGER

ALBERT J. KRIEGER
Attorney for Petitioner Bonanno
ALBERT J. KRIEGER, P.A.
1428 Brickell Avenue, Suite 500
Miami, Florida 33131
(305) 377-0800

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three copies of the foregoing Petition for Writ of Certiorari were mailed to each of the following persons on this 24 day of November, 1982.

Sanford Svetcov, Esq.
Attorney-in-charge
U.S. Department of Justice
Organized Crime and Racketeering Section
450 Golden Gate Avenue
San Francisco, California 94102

Solicitor General
Department of Justice
Washington, D.C. 20530

Frank R. Ubhaus, Esq.
Pitto & Ubhaus
Suite 1300
2 North Second Street
San Jose, California 95113

ALBERT J. KRIEGER

ALBERT J. KRIEGER